

NO. 40523-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JASON LLOYD SMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Roger A. Bennett, Judge

BRIEF OF APPELLANT

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A. ASSINGMENTS OF ERROR

1. Trial counsel's failure to request a limiting instruction denied appellant effective assistance of counsel.

2. Trial counsel's failure to object to damaging propensity evidence denied appellant effective assistance of counsel.

Issues pertaining to assignments of error

1. Appellant was charged with felony violation of a protection order based on an allegation that he called the protected party, his ex-girlfriend, from jail. The ex-girlfriend testified that she believed someone else had called her, and she could not identify appellant's voice on the recording. The court admitted her prior inconsistent statement to a detective that appellant was the caller, but defense counsel failed to request an instruction limiting the use of that evidence to impeachment. Where there is a reasonable probability the jury relied on the prior statement as substantive evidence, undermining confidence in the outcome of the proceedings, does counsel's error require reversal?

2. To prove felony violation of a court order, the State was required to prove appellant had two prior convictions for violating protection orders. The State presented evidence not only that appellant had previously been convicted, but also that the previous convictions involved phone calls from jail, as the State was alleging occurred in this

case. Did trial counsel's failure to object to this damaging propensity evidence deny appellant effective representation?

B. STATEMENT OF THE CASE

1. Procedural History

On December 21, 2009, the Clark County Prosecuting Attorney charged appellant Jason Smith with two counts of felony domestic violence court order violation. CP 3-4; RCW 26.50.110(5). The case proceeded to jury trial before the Honorable Roger A. Bennett, and the jury returned guilty verdicts. CP 60-61. The court imposed the statutory maximum sentence of 60 months, based on Smith's offender score. CP 64. Smith filed this timely appeal. CP 80.

2. Substantive Facts

Jason Smith was charged with two counts of violation of court order prohibiting him from contacting Frances Drake. CP 3; 1RP¹ 50-52; Exhibit 2. The first count was based on Smith's attempt to call Drake at 3:30 a.m. on December 1, 2009. CP 54; 1RP 120. The second count was based on a call made to Drake's cell phone from the Clark County Jail at 3:49 that afternoon. CP 55; 1RP 126.

¹ The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—2/22/10; 2RP—2/23/10; 3RP—3/12/10.

Smith's community corrections officer testified that he went to Smith's residence to do a home check on the afternoon of December 1, 2009. 1RP 117. While he was in Smith's room, he noticed a scrap of paper with the name Frances and a phone number on it. 1RP 117-18. He asked Smith if the paper referred to Drake, and Smith said it did. 1RP 118. The officer then called the number, spoke to someone, and determined the number belonged to Drake. 1RP 118-19. The officer looked through Smith's cell phone and saw an outgoing call to Drake's number at 3:30 that morning. 1RP 120. Smith denied having contact with Drake but said he had attempted to call her and left a voice message. 1RP 121-22. Smith was arrested for violation of the no contact order. 1RP 121.

The community corrections officer informed the police of Smith's possible violation and passed along the paper with Drake's phone number. 1RP 125-26. A Vancouver Police detective conducted a search of the inmate phone call monitoring system from the Clark County Jail and located a recording of a call made from the jail booking area to Drake's phone number at 3:49 p.m. on December 1, 2009. 1RP 126. Based on the contents of the conversation and information from the community corrections officer about Smith's living arrangements and property arrangements, the detective believed that Smith was the caller. 1RP 128.

At trial, Drake testified that she did not recall receiving a voice message from Smith. 1RP 27. Drake then listened to a recording of the call from the jail. She agreed that the recording was accurate and that she was one of the people talking. 1RP 30. She believed the caller was John Davis, her daughter's father, who was in jail at that time. 1RP 32. Drake did not think Smith was the caller, and she denied telling the detective that Smith had called her. 1RP 34-35, 38-39.

The detective testified that he had talked to Drake during his investigation. When defense counsel objected that Drake's statements were hearsay, the court agreed and sustained the objection. 1RP 128-29. The court ruled, however, that the State could elicit Drake's statements which were inconsistent with her testimony at trial for impeachment, but not as substantive evidence. 1RP 130. The detective then testified that Drake confirmed she had received a voice message from Smith on the morning of December 1, 2009, and that she had spoken with Smith from the jail that afternoon. 1RP 131. Defense counsel did not request an instruction limiting the jury's use of that testimony to impeachment.

The detective also testified about his interview with Smith. He said that Smith admitted calling Drake's number around 3:30 a.m. on December 1, because he thought he was going to be arrested and he wanted her to take care of his property. 1RP 133-34. When the detective

asked Smith about the call from the jail, Smith denied making it. 1RP 135. The detective then went on to describe the contents of the phone call, and Smith said “Uh huh,” and nodded his head as the detective was speaking, which the detective felt meant Smith was acknowledging making the call. 1RP 135. The State played a copy of the recorded phone call to the jury, and the exhibit was admitted based on the detective’s testimony regarding how the recording was created and his opinion that the voice on the recording was Smith’s. 1RP 135; 2RP 170-71, 181; Exhibit 18.

Because Smith was charged with felony violations of the no contact order, the State presented evidence that Smith had three prior convictions for violating a domestic violence no contact order involving Drake. 1RP 44-45; Exhibit 1. The State’s witness testified that Smith’s prior violations were for making phone calls from jail as well. 1RP 59. Defense counsel did not object to this testimony.

C. ARGUMENT

TRIAL COUNSEL’S UNPROFESSIONAL ERRORS DENIED
SMITH EFFECTIVE ASSISTANCE OF COUNSEL.

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his

attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. Thomas, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

1. **Trial counsel was deficient in failing to request a limiting instruction.**

The Washington Supreme Court has recognized that counsel may be ineffective for failing to propose a jury instruction. See State v. Thomas, 109 Wn.2d at 226 (counsel ineffective in failing to propose instruction that would allow counsel to argue defendant's intoxication negated mens rea). In this case, although Drake's statements to the detective were admissible only to impeach her credibility, defense counsel never requested that the court give a limiting instruction.

A witness may be impeached with prior out of court statements of material fact that are inconsistent with his or her testimony in court. ER 607; ER 613; State v. Clinkenbeard, 130 Wn. App. 552, 569, 123 P.3d 872 (2005); State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312, review denied, 109 Wn.2d 1001 (1987). But the crucial distinction is that impeachment evidence goes only to the witness's credibility; it may not be considered as proof of the substantive facts encompassed by the evidence. Clinkenbeard, 130 Wn. App. at 569; State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). Thus, where prior inconsistent statements are admitted to impeach a witness, "an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper

and necessary.” Johnson, 40 Wn. App. at 377 (citing State v. Pitts, 62 Wn.2d 294, 297, 382 P.2d 508 (1963)).

When evidence is admissible for one purpose but not another, the court must give a limiting instruction on request by either party. ER 105; State v. Gallagher, 112 Wn. App. 601, 611, 51 P.3d 100 (2002), review denied, 148 Wn.2d 1023 (2003). Without a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others. State v. Meyers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Therefore, where no instruction is sought limiting the jury’s use of prior inconsistent statements, the jury may consider the prior statements as substantive evidence. Id.

Here, Drake testified at trial that she did not believe Smith had called her from jail. 1RP 32, 35, 38-39. The detective then testified that Drake had said Smith called her. 1RP 131. Even though the defense was entitled to an instruction limiting the jury’s use of Drake’s prior statement, counsel failed to request one, creating the very real problem that the jury may have considered the statement as substantive rather than merely impeaching evidence. See State v. Hancock, 109 Wn.2d 760, 766, 748 P.2d 611 (1988).

Courts generally presume that counsel’s decision not to request a limiting instruction was a tactical choice to avoid re-emphasizing

damaging testimony. State v. Donald, 68 Wn.App. 543, 551, 844 P.2d 452 (1993). But, while an attorney's decisions are afforded deference, "tactical" or "strategic" decisions by defense counsel must still be reasonable decisions. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.").

Counsel's failure to request a limiting instruction was not a reasonable choice in this case. Without Drake's statement to the detective that Smith had called her, no one personally acquainted with Smith identified him. Only the detective gave an opinion that Smith was the caller based his review of other recordings, which the jury did not hear. 2RP 181. Moreover, Smith denied making the call, and Drake testified that it was not Smith on the recording. 1RP 39, 140. There was no advantage in counsel attempting to downplay Drake's lack of credibility, when her prior inconsistent statement was the State's best evidence that Smith was the caller. It was unreasonable for counsel not to prevent the jury from relying on Drake's prior statement as substantive evidence. An instruction limiting the jury's use of Drake's prior inconsistent statement was "both proper and necessary." See Johnson, 40 Wn. App. at 377.

2. Trial counsel was deficient in failing to object to damaging propensity evidence.

“The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined.” State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, and not convicted because the jury believes he is a bad person who has done wrong in the past. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In light of this principle of fundamental fairness, ER 404(b) forbids evidence of prior acts which establishes only a defendant’s propensity to commit a crime. Wade, 98 Wn. App. at 333. While specific acts of misconduct may sometimes be introduced for other purposes, they can never be used to establish bad character. ER 404(b)²; State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence of other misconduct may not be admitted merely to show a defendant is a “criminal type” who is likely to have committed the charged crime. State v. Brown, 132 Wn.2d 529, 570, 940 P.2d 546 (1997), cert. denied, 118 S. Ct. 1192 (1998).

Here, Smith was charged with violating a protection order by calling Drake from jail. The State presented evidence that Smith’s

² ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

previous convictions for violating court orders were based on calls from jail as well. 1RP 59. While the fact that Smith had previously been convicted of violating protection orders was relevant to the charges in this case³, the details of those prior convictions were not. The only purpose served by evidence that Smith had committed the previous offenses by calling Drake from jail was to suggest that Smith was a criminal type, who had spent time in jail, and who must be guilty in this case as well. Nonetheless, trial counsel failed to object to this testimony.

Evidence of prior bad acts is presumptively inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). “Doubtful cases should be resolved in favor of the defendant.” Wade, 98 Wn. App. at 334. The trial court would have likely sustained an objection to the testimony about Smith’s prior conduct on ER 404(b) grounds, because the details of Smith’s prior convictions were not relevant at trial and were unduly prejudicial to the defense, calling attention to his criminal propensity. Counsel was deficient in failing to object to the testimony, as Smith derived no conceivable benefit from this evidence.

³ See RCW 26.50.110(5).

3. Counsel's deficient performance renders the trial outcome unreliable.

There is a reasonable probability that counsel's unprofessional errors affected the outcome of the case. The State's case against Smith was not overwhelming. Drake testified that she believed her daughter's father, not Smith, was the person who called her from jail, and Smith denied calling Drake from jail. 1RP 34-35, 38-39, 140. While the detective testified that he felt Smith had acknowledged making the call by nodding his head as the detective described the contents of the call, he admitted that Smith denied making the call. 1RP 135. The detective believed he recognized Smith's voice on the recording, but he was familiar with Smith only in his professional capacity, and the jury was not able to test the reliability of his identification. 2RP 181.

But because of counsel's errors, the jury was permitted to consider Drake's prior statement that Smith had called her as substantive evidence. Rather than impeaching Drake's credibility, the prior inconsistent statement unfairly bolstered the State's case. The State's case was further bolstered by the improper inference that because Smith was a criminal type who had committed similar acts in the past, he must be guilty of the charged offense. Counsel's errors undermine confidence in the outcome of the case, and reversal is required.

D. CONCLUSION

Trial counsel's failure to request a necessary limiting instruction and failure to object to damaging propensity evidence constitute ineffective assistance of counsel, and Smith's conviction should be reversed.

DATED this 10th day of August, 2010.

Respectfully submitted,

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